

Thereafter, petitioner filed in this district a habeas corpus petition challenging the 1994 conviction, see Frelimo v. White, C 97-0215 MMC (PR), and, on October 8, 1998, the

1 Court denied the petition on the merits, (see id. Docket No. 11).

2 By the instant petition, petitioner challenges the validity of the 1994 conviction on the
3 grounds his conviction was obtained in violation of the prohibition against double jeopardy
4 and that he was denied effective assistance of counsel.

5 DISCUSSION

6 Where a claim presented in a second or successive habeas corpus petition under
7 28 U.S.C. § 2254 has been presented in a prior petition, such claim must be dismissed.
8 28 U.S.C. § 2244(b)(1). Where a claim presented in a second or successive habeas corpus
9 petition under § 2254 has not been presented in a prior petition, such claim likewise must be
10 dismissed, unless: (1) the claim relies on a new rule of constitutional law, made retroactive to
11 cases on collateral review by the Supreme Court, or (2) the factual predicate for the claim
12 could not have been discovered previously through the exercise of due diligence, and the
13 facts underlying the claim would be sufficient to establish by clear and convincing evidence
14 that, but for constitutional error, no reasonable fact-finder would have found the petitioner
15 guilty of the underlying offense. Id. § 2244(b)(2). Before a second or successive habeas
16 petition may be filed in the district court, the petitioner must first obtain an order from the
17 court of appeals authorizing the district court to consider the petition. Id. § 2244(b)(3)(A).

18 The instant petition presents claims challenging the 1994 conviction that was the
19 subject of petitioner's prior federal habeas corpus petition. Consequently, petitioner may not
20 proceed with such claims until he has sought or obtained an order from the Ninth Circuit
21 Court of Appeals, authorizing him to file a second or successive petition in the district court.
22 Accordingly, the instant petition will be dismissed without prejudice to petitioner's refiling
23 the petition if he obtains the necessary order.¹

27 ¹Petitioner has filed a motion for appointment of counsel to represent him in the
28 instant action. Because the petition is subject to dismissal, the motion for appointment of
counsel is hereby DENIED as moot. (Docket No. 5.)

CONCLUSION

For the reasons stated above, the petition is hereby DISMISSED, without prejudice, as a second or second successive petition under 28 U.S.C. § 2244(b).


In light of petitioner's lack of funds, the application to proceed in forma pauperis is hereby GRANTED.

This order terminates Docket Nos. 5 and 6.

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: September 22, 2008


MAXINE M. CHESNEY
United States District Judge